UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

JAWONIO, INC.

Employer

and

Case No. 02-RC-081336

LOCAL 888, UNITED FOOD & COMMERCIAL WORKERS
Petitioner

Steven H. Kern, Esq., and Lauren M. Kugielska, Esq., Counsel for the Petitioner Edward V. Jeffrey, Esq., Counsel for the Employer

DECISION ON OBJECTIONS

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on September 4, 2012. The Petition in this case was filed on May 16, 2012 by the Union. Pursuant to a Stipulated Election Agreement executed on June 15, 2012, a secret ballot election was held on June 29, 2012 in the following unit:

Included: All full-time and regular part-time, and per-diem DSP's, DSP floaters, DSP per-diems, assistant housekeepers, housekeepers, recreation aides, recreation supervisors, senior cook, LPN's wheelchair technicians, DSP's day hab, day hab advocacy coaches, day hab specialists, DSP day hab assistants, production rehab assistants, cleaners, senior cleaners, maintenance aids/drivers, assistant mechanics, and maintenance coordinators, employed by the Employer in its residential and day programs at various sites New York.

Excluded: All other employees, including office clerical employees, and guards, professional employees and supervisors as defined in Section 2(11) of the Act.

The tally of ballots showed that 130 votes were cast for the Petitioner, 138 votes were cast against representation, 1 vote was void and 2 individuals cast challenged ballots. The result was that a majority of the valid votes counted plus challenged ballots were not cast for the Petitioner. On July 9, 2012, the Petitioner filed timely objections to the election.

Based on the record as a whole, including credibility findings based in part on demeanor ground, I hereby make the following

Findings and Conclusions

The Employer operates a not for profit enterprise that provides various services, including residential services, for disabled persons or individuals with developmental issues. These services are provided at various locations including residential facilities in Westchester County, New York.

5

10

15

20

25

30

35

40

45

50

The election was held at six polling sites. The scheduled times for four of the sites were 6:00 a.m. to 8:30 a.m., 1:00 p.m. to 3:00 p.m., and 9:30 p.m. to 11:00 p.m. At the other two sites, the voting took place at 6:00 a.m. to 8:30 a.m. and 1:00 p.m. to 3:00 p.m. This schedule was selected because employees work on three shifts in order to cover a 24 hour, 7 day schedule.

Objection No. 1

The Union alleged that on a couple of occasions an employer representative told employees that she had knowledge as to which employees were pro-Union.

No evidence was produced at the hearing to support this contention. Accordingly, this objection is overruled.

Objection No. 2

In this objection, the Union contended that "during the critical period, an employer representative, during a company initiated meeting, stated that she would try to get the employees a raise and asked employees to give the Company another chance."

The Union produced two employee witnesses who testified that at a meeting held within a week before the election, the employer's CEO, Jill Warner, spoke to employees as a group and told them that employees had the right to vote whichever way they chose, that she could not make any promises and that she would like the employees to give the company a chance. One employee testified that she said something to the effect that she asked the employees to give the company a chance for 6 months or a year. Other than the statement asking employees to give the company a chance, there was no other evidence that either Ms. Warner or any other employer representative made any promises, implied or direct, to give employees a raise or any other benefit. See *Noah's New York Bagels*, 324 NLRB 266, 267 (1997) where similar statements were made to employees before an election. In that case the Board stated:

In *National Micronetics*, 277 NLRB 993 (1985), the Board found no violation where the employer confessed that it had neglected matters in the past and asked for a second chance to make things better. That was the essence of Respondent's speech here. As in *National Micronetics*, the Respondent did not make any specific promise that any particular matter would be improved. As the Board there explained: "Generalized expressions of this type, asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda."

In view of the above, it is my conclusion that this objection should be overruled.

Objection No. 3

The Union contended that "on June 29, 2012, the day before the election, the Employer representatives engaged in the following conduct:

- a. Asked two employees to be an election observer for the company one day after the union sent the employer a list of election observers for the union that included the two employees in question.
- b. The employer prevented employees designated as union observers from sitting at the election for the union.
- c. Signs stating "Vote No Union at Jawonio" were posted at the polling sites.
- d. The Employer was present in front of each polling site."

5

10

15

20

25

30

35

40

45

50

The Union presented an employee, Mr. Lucas, and a union representative, who testified that Lucas had been chosen to be the union's observer at the Tech location for the 1:00 p.m. to 3:00 p.m. shift. Their testimony was, in effect, that shortly before the start of the election, he was told by a company supervisor that he was not needed and that he thereupon went across the street to McDonald's to get his lunch. Their testimony was that when it was discovered that he was not present, the union representative and the supervisor who allegedly told him that he wasn't needed, called him at McDonald's, told him to return and to bring his lunch back with him.

The supervisor in question testified that she did not tell him that he wasn't needed at the election and that when he asked her if there was enough time to get lunch she said that there was. She testified that before the election started, she had a phone conversation with Lukas and told him that it was OK for him to bring his lunch to the election.

In any case, the evidence shows that Mr. Lucas managed to get back to the election before it started and that there was no prejudice to either party by his temporary and brief absence. In my opinion, these facts would not warrant setting the election aside.

The Union offered evidence showing that at one of the polling places, two persons who concededly were supervisors or managers, stood outside the Balmoral residence which was used as a polling site. (They were Mark Campione, the Chief Financial Officer and a Mr. Powers, the head of maintenance). The election was held in the basement of that home. They testified that these two men stood outside and near the main entrance to the building for an extended period of time from about 6:30 a.m. to perhaps 7:15 a.m. The union agents involved in this election stationed themselves in a car about 100 feet away from the residence and took photos which show that the two men appear to have talked to two or three voters as they approached the entrance. The union's witnesses testified that they saw these two managers speak to employees as they approached the building but could not hear what they said. One of the union's agents testified that although she did not hear what they said, she saw one mouth the word "no" to one voter who was on his way into the building.

The Employer presented Mark Campione who testified that he and Powers went to the site because he was concerned that there might be an automobile congestion issue at the small cul de sac where the residence was located. He testified that soon after he got there, he and Powers went outside to have a cigarette. Campione testified that he did not speak to employees as they approached the residence except perhaps to say hello, and that he did not engaged in any electioneering. The evidence shows that Campione left the building after about 20 minutes, but that Powers remained behind. Although it might seem improbable that the

union's witness could have seen Powers say no to one voter as that voter approached the building, this testimony was not controverted as Powers was not asked to testify.

5

The Union also presented evidence that at two polling locations, the Employer posted signs, in English and French, stating "Vote No at Jawonio." $^{\rm 1}$

15

10

At the tech site, (which was Poll 6), the evidence showed that this sign, in English and French, was posted in the hallway that ran from the main entrance of the facility to the cafeteria where the election was held. Thus, it is probable that voters who entered the facility through this entrance, would have seen these signs on their way to the room where the election was being held.

20

The other location was a residential home located in Yonkers, New York. The election at this location was held in the basement of the residence and there are two entrances that give access to the basement. ² One entrance is at the right side of the building and employees using that entrance can go directly from the outside of the building to the basement. The other entrance is located inside the residence, near the main entrance, and after entering the building one would go down a short flight of stairs to get the basement. The vote no signs were posted just inside the stair way entrance and although the door opens to the inside in such a manner that it would cover the signs, anyone who closed the door and walked down to the basement, would almost surely have seen the signs.

25

The evidence is that these vote no signs were posted at these two sites for the entire time of the election. ³ Indeed, the posting of these signs is consistent with the testimony that at least one of the company's supervisors stationed himself outside the main entrance to the Balmoral site and told (or asked), at least one employee to vote no as he approached an entrance to the building.

30

There was, however, no evidence that the Board agent established the outside of the building as a no-electioneering area. (As the election was being held in the basement, it would have been impossible for the Board agent to police the outside of the building for electioneering).

40

35

In my opinion, the facts presented are not sufficient to overturn the election. In the case of the two managers who stood outside the entrance of the Balmoral voting site, this was not designated as a no electioneering area and was not an area where employees were lining up to vote. Except for the lip read "no" that was attributed to Powers in the case of one voter, there is no other evidence that either manager engaged in other electioneering. I therefore do not conclude that the actions of these two managers would constitute objectionable conduct under the rationale of *Milchem Inc.*, 170 NLRB 362 (1968). See also, *C&G Heating and Air Conditioning*, 356 NLRB No. 133 (2011).

50

45

I also conclude that the posting of the vote no signs in the hallway at the Tech site and on the stairway leading to the voting area at the Balmoral site, although unfortunate, are not sufficient to overturn the election. I note that these signs were outside the polling areas and not within any Board agent designated no-electioneering area. In any event, the Board has held in

¹ The posters at the bottom stated; "Distributed for your information by Jawonio."

² There apparently is a third entrance to the building which, however, does not lead directly to the basement.

³ The evidence was that about 80 employees voted at the Balmoral polling place.

Queen Kapiolani Hotel, 316 NLRB 655, 668 (1995) and *U-Haul of Nevada, Inc*, 341 NRB 195 (2004), that the wearing of a union t-shirt or other insignia by an observer during the election is not objectionable as improper electioneering. ⁴ In *Larkwood Farms, a Division of the Pillsbury Company*, 178 NLRB 226 (1969) the Board citing *Western Electric Company, Inc.*, 87 NLRB 183, 185, concluded that "the impact on the voters is not materially different whether the observers wear pro-union or anti-union insignia." Therefore, if union and company observers can, during an election, wear pro-union and anti-union signs on their garments, I can't see that much difference with a simple vote no sign that was posted outside, albeit fairly near to the polling areas. ⁵

Conclusions of Law

15

5

10

Based on the above and the record as whole, I conclude that the Objections have no merit and should be dismissed.

ORDER

20

The representation case is to be remanded to the Regional Director of Region 2, for the purpose of issuing the appropriate Certification of Results. ⁶

Dated, Washington, D.C., October 3, 2012.

25

Raymond P. Green Administrative Law Judge

30

35

⁴ In *U-Haul of Nevada, Inc.*, former Board members Batista and Schaumber indicated that it might be prudent to prohibit such conduct.

⁴⁰ ⁵ The Employer cites 2 Sisters Food Group, Inc., 357 NLRB No. 168 (2011) where the Judge concluded that posted "vote no" signs near the election area were not grounds for setting aside the election. She however, found other conduct sufficient to overturn the election and the Board did not rule on this specific point. The Union cites Fieldcrest, 318 NLRB 470, 472 (1995), which, in my opinion is distinguishable. In that case, the "vote no" signs were posted in the context of other conduct found to 45 objectionable, such as threats of plant closure. Further, the signs were a lot stronger than the signs in the present case. One featured a picture of a nuclear explosion with the caption: "There's more than one way to destroy a community. VOTE NO." Another advertisement showed a group of workers standing outside of a plant gate with the sign "closed" hanging on the gate. The caption read: "In the past decade, scores of textile plants have closed in North Carolina. Thousands of workers have lost their jobs. 50 Fieldcrest Cannon lost \$41 million last year. Vote NO union." The Board noted in Fieldcrest that these "advertisements clearly conveyed to employees threats of job loss and plant closure if the Union won the election."

⁶ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by October 17, 2012.